UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al.*, Defendants.	)	No. 1:18-cv-4483-ghw

THE BOARD DEFENDANTS' RESPONSE TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE LEHRBURGER'S REPORT AND RECOMMENDATION THAT PLAINTIFF'S CLAIMS BE DISMISSED WITH PREJUDICE

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INTRODUCTION

Magistrate Judge Lehrburger issued a 60-page Report & Recommendation ("R&R," ECF 90) recommending that the Court dismiss all five counts of Plaintiff Christopher Hudson's Complaint, with prejudice. Hudson's Objections (ECF 91) raise no new arguments. They attempt to create disclosure obligations that are not recognized by Second Circuit law and are plainly unworkable.

As Judge Lehrburger recognized, Hudson invented his disclosure theory to get around a Plan interpretation upheld by two federal courts. *See* R&R at 47 (noting the Retirement Board's "interpretation of these specific terms has been adopted as 'reasonable' by two federal district courts considering similar player lawsuits"). The Court should adopt Judge Lehrburger's thorough and thoughtful analysis, dismiss the Complaint with prejudice, and end this contrived attempt to turn a benefit denial into a class action.[1]

ARGUMENT & AUTHORITIES

I. The Court Should Overrule Hudson's Objections Concerning Count I.

ERISA section 102 provides that a Summary Plan Description ("SPD") "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). Count I contends the SPD violated section 102 because it failed to reasonably apprise Players that a higher standard applied to reclassification requests. Compl ¶¶ 5, 80. The Court should dismiss Count I with prejudice.

[1] For the sake of brevity, this brief does not repeat all of the arguments set out in the Board Defendants' prior briefing. The Board Defendants do not intend to waive any prior arguments, however, by omitting them here. In addition, this brief does not address Count III, which Hudson brought against the NFL Management Council and the NFL Players Association exclusively.

A. Judge Lehrburger correctly concluded the SPD reasonably apprised Players of the heightened standard for reclassification, and Hudson's Objections do not argue otherwise.

Judge Lehrburger correctly concluded that the SPD "comports with the requirements of 29 U.S.C. § 1022 as a matter of law," R&R at 46, and Hudson does not object to this conclusion. Nor could he. The SPD "juxtaposes the Plan's standards for initial classification decisions against the separate reclassification standard, and in doing so, reasonably informs participants such as Hudson that a higher standard applies." R&R at 46. The SPD addresses the reclassification rules in a different section, under a different heading, and states that a Player like Hudson would continue to receive the benefits for which he first qualified unless he presents "clear and convincing" evidence of "changed circumstances." R&R at 46; *see* SPD at 18.[2] "In other words, the text and format of the [SPD] both indicate to a participant that the standard is heightened when making a reclassification request." R&R at 46-47.

B. Judge Lehrburger correctly concluded ERISA does not require disclosure of discretionary interpretations of plan terms.

Hudson objects to Judge Lehrburger's separate conclusion that ERISA does not require a plan administrator to disclose discretionary interpretations of plan terms. Obj. at 8. Judge Lehrburger addressed, and soundly rejected, Hudson's arguments on this point.

As the Board Defendants explained in their briefing, ECF 75 at 3, the case Hudson relies on—*Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572 (2d Cir. 2006)—is not on point because it does not address whether section 102 of ERISA requires an SPD to include discretionary interpretations of plan terms. R&R at 47-48 ("Hudson does not cite any analogous case where a court has found that a plan fiduciary could be held liable under ERISA because the

[2] Attached to the Declaration of Michael L. Junk In Support Of The Retirement Board's Motion to Dismiss (ECF 56) as Exhibit B.

summary plan description failed to disclose a discretionary interpretation of an internal standard of review."). Rather, *Wilkins* addressed a plan administrator's formal-but-undisclosed written "Policy" that required participants to maintain and subsequently produce evidence of employment with participating employers. The "Policy" was implemented to address underreporting of participants' earnings by employers—a "persistent and acknowledged problem" in the industry. *Id.* at 574, 584. Critically, however, "no provision of the SPD even arguably g[ave] notice of the Policy." *Id.* at 582. While the *Wilkins* court found the SPD to be inadequate, it did so based on unique facts, and the court was careful to note that "an SPD need not anticipate every possible idiosyncratic contingency that might affect a particular participant's or beneficiary's status." *Id.* at 584 (citation and internal quotation marks omitted).

The facts presented in *Wilkins* are far different. Here, the SPD gave clear notice of the heightened standard for reclassification of benefits. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 192-93 (2d Cir. 2007) (rejecting plaintiff's reliance on *Wilkins* and finding that SPD reasonably apprised plan participants and beneficiaries of their rights, explaining that "[i]t did so by apprising participants and beneficiaries of the deferred vested retirement benefit in general and by specifically distinguishing that benefit from the early retirement benefit."). No written policy is at issue. The Board instead was exercising its discretionary authority to interpret and apply the terms of the Plan, as authorized by the Plan and federal law. Plan Doc. § 8.2[3]; *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) (holding that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.").

[3] Attached as Exhibit A to Junk Decl.

There are good reasons why Judge Lehrburger concluded "[a]s a practical matter, the level of disclosure that Hudson seeks to inject into 29 U.S.C. § 1022 would be unworkable." R&R at 48. A plan interpretation is an application of plan terms to a set of facts. No person, fiduciary or otherwise, can describe all past fact patterns and conclusions, or anticipate all future fact patterns. Courts routinely give plan fiduciaries leeway to interpret and apply plan terms. Here the SPD complied with ERISA because it accurately described the Plan's terms. The Court should reject Hudson's attempt to "stretch[ ] ERISA's requirements beyond their bounds." R&R at 44.

Hudson's suggestion that, as football players, the Plan's "average participants" are incapable of understanding the SPD lacks foundation. The Complaint is devoid of any allegation that Hudson ever read the SPD or developed any (mis)understanding of the reclassification provision. R&R at 48, n.19. Hudson's inability to articulate what he understood, what he would have done differently, or how an adequate SPD would have led to the increased level of benefits he seeks shows that this case involves the very type of "idiosyncratic contingency" the *Wilkins* court had in mind when it recognized that an SPD need not discuss every situation imaginable.[4]

C. Judge Lehrburger correctly concluded Count I is untimely.

Judge Lehrburger's application of a three-year limitations period to Count I is consistent with at least two other courts in this district, post-*Amara*. *Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 WL 744600, at *5 (S.D.N.Y. Feb. 24, 2017) ("ERISA does not prescribe a statute of limitations for disclosure claims under § 102…. [I]n this situation courts apply the

[4] Hudson's reliance on *Wilkins* is also misplaced because *Wilkins* makes clear that "[a] deficient SPD does not by itself mean that [plaintiff] prevails; to recover in this Circuit, a plaintiff must demonstrate likely prejudice resulting from a deficient SPD." 445 F.3d at 585. Hudson has not plausibly alleged that he was prejudiced by the SPD's supposed shortcomings. *See* Fed. R. Civ. P. 8(a)(2) (a complaint must "show[ ] that the pleader is entitled to relief"); *Ashcroft v. Iqbal*, 556 U.S. 662, 667-79 (2009) (discussing the pleading standard, and noting that Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation").

most similar state statute of limitations…. The New York statute of limitations applicable to Plaintiffs' disclosure claims is the three-year period governing statutory violations."); *Osberg v. Footlocker, Inc.*, 138 F. Supp. 3d 517, 559 (S.D.N.Y. 2015) ("This Court previously determined that an SPD claim is subject to a three-year statute of limitations.").

Hudson improperly attempts to escape the three-year limitations period. Hudson knew or, at the very least ***should have known***, before May 21, 2015 (three years prior to the Complaint) that the Board interpreted the "changed circumstances" provision to require more than "new evidence relating to the character of an existing impairment." Obj. at 6. As explained above, the text and format of the SPD made it clear that a higher standard applied to requests for reclassification. It is significant that Hudson was represented by counsel when he sought reclassification. Minimal due diligence on the part of Hudson's attorney would have revealed the *Boyd* decision, which explained the Board's interpretation and application of the Plan's reclassification provision. "The existence of a public governmental or judicial decision can serve to put parties 'on notice' of the decision's factual and legal conclusions, particularly when a party is represented by counsel." R&R at 50. "This presumption is particularly strong in the context of this dispute." R&R at 50. "The fact that counsel was actively representing Hudson in claims virtually identical to the ones in *Boyd* undermines any argument that Hudson was not, or should not have been, fully aware of the Retirement Board's interpretation of the standard for reclassification."[5] R&R at 50.

[5] In his analysis, Judge Lehrburger focused on the *Boyd* decision, which was a published decision. However, the *Bryant* decision explained the Board's interpretation of the reclassification provision, and it came out in March 2015, nearly simultaneous with Hudson's request for reclassification. *See Bryant v. Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 1:12-cv-936 (N.D.G.A., March 23, 2015) ("[T]his Court concurs with the decision of the Boyd court that the Plan's interpretation of the term 'changed circumstances' as meaning a change in physical condition is within the authority of the Plan and reasonable."); Compl. ¶ 37 (noting that Hudson's attorney appealed the initial denial of his request for reclassification on March 27, 2015).

Hudson does not seriously dispute that constructive knowledge of the Board's interpretation of the reclassification provision is sufficient to trigger the statute of limitations. Nor does Hudson dispute that certain "federal publications integral to the claims, where the document itself provided notice of the relevant facts" may form the basis for constructive knowledge. *See* Obj. at 13 (summarizing the holdings of prior cases); *Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166, 1171 (D. Kan. 2008) (holding that claims for breach of fiduciary duty, fraud, negligent misrepresentation and conspiracy, based on allegedly bad tax advice, were time-barred because the statute of limitations began to run when the IRS published a document that would have put the plaintiff on notice of his claim). Hudson instead argues that *Boyd* is not the type of published document that can provide the requisite constructive knowledge. Obj. at 13. He offers no reason, however, why a published federal court decision (which he concedes fully explained and upheld the Board's interpretation as reasonable and consistent with prior practices) is distinguishable from the types of publications found sufficient to provide constructive notice.[6]

II. The Court Should Overrule Hudson's Objections Concerning Count II.

In Count II, Hudson alleges the Board and each of its individual members breached their fiduciary duties by not disclosing their interpretation of the reclassification provision in the SPD. Compl. ¶¶ 81-88. This claim fails as a matter of law and is untimely. The Court should overrule Hudson's Objections, which merely reiterate already discredited arguments and reframe Judge Lehrburger's conclusions in an attempt to cast doubt on them.

[6] Hudson's related argument that Judge Lehrburger's decision necessarily confers "constructive knowledge of every court decision involving the plan," Obj. at 14, is incorrect. Judge Lehrburger determined only that Hudson reasonably should have known about a published federal court decision directly relevant to his claim prior to May 21, 2015.

A. Judge Lehrburger correctly found Count II fails to state a claim.

Hudson contends that some omissions are sufficient to support a fiduciary breach claim. Obj. at 16; ECF 72 ("Pl.'s Opp.") at 25. Case law is clear that an omission is actionable only when the fiduciary "knows that its failure [to disclose information]… might cause harm." Obj. at 16 (quoting *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001)). *See also Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 292 (2d Cir. 2006) (explaining that a duty to disclose arises where, among other things, a party "possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge."). The Complaint lacks plausible, factual allegations that the Board knew Hudson would be harmed by the supposed failure to explain the reclassification provision at the time of his original application for benefits. Hudson does not even state how his conduct was affected or what he would have done differently. R&R at 48, n.19.

Hudson argues that unintentional misrepresentations are sufficient to support a fiduciary breach claim, Obj. at 16, Pl.'s Opp. at 25, but this case involves an alleged "omission" not any "misrepresentation." Also, "[t]o establish a breach of fiduciary duty based on *un*intentional misrepresentations, [a plaintiff] must satisfy the more restrictive standard… recognized in *Estate of Becker*," where the Second Circuit held that a fiduciary breach exists if a plan's "agent inadvertently misleads participants about a benefits question on which the summary plan description, too, is unclear." *In re DeRogatis*, 904 F.3d 174, 194 (2d Cir. 2018). *See also Estate of Becker v. Eastman Kodak Co.*, 120 F.3d 5, 10 (2d Cir. 1997) (a fiduciary responding to a benefits question cannot provide a materially misleading response that further exacerbates a lack of clarity). Hudson makes no such allegations here.

After citing inapposite case law, Hudson spends the remainder of his Objections arguing that "[t]he existence of a claim under ERISA § 102 does not preclude a claim under ERISA § 404." Obj. at 17. But Hudson has not alleged the type of knowing, deliberate conduct needed to state a fiduciary-breach claim. Count II merely adopts the same allegations from Count I, and re-labels the conduct a breach of fiduciary duty. As Judge Lehrburger concluded, "[i]t would make little sense to hold that the Retirement Board met ERISA's relatively limited requirements for the contents of [SPDs], yet nevertheless breached its fiduciary duties under [section 404] by failing to disclose its interpretations of those provisions." R&R at 52.

B. Judge Lehrburger correctly concluded Count II is untimely.

ERISA section 413(1) is a statute of repose; it bars any claim brought more than six years after the "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113. *See California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (citing section 413 as a statute of repose).[7] Count II is untimely under both subsections.

Hudson contends the Board breached its fiduciary duties by not disclosing its interpretation of the reclassification provision "in advance of the time" he filed his initial claim for benefits and that he became "locked in" to a lower category as a result of his original benefit award. Compl. ¶¶ 5, 80, 84, 88. Hudson applied for benefits on March 9, 2010. Compl. ¶ 32. He was awarded benefits on May 20, 2011. Compl. ¶¶ 33-34. His Complaint, filed on May 21, 2018, is untimely under either starting point.

[7] "[T]he last opportunity to cure an omission is the last date on which [d]efendant could have averted [p]laintiffs' detrimental reliance on the incomplete information." *Moyle v. Liberty Mut. Ret. Benefit Plan*, No. 10CV2179-GPC(MDD), 2016 WL 7242021, at *13 (S.D. Cal. Dec. 15, 2016) (citations and quotation marks omitted).

To avoid the dispositive impact of his own allegations, Hudson again attempts to invoke the fraud or concealment exception to section 413. Obj. 18-19; Pl.'s Opp. at 30-32 (raising same argument). Hudson, however, "does not sufficiently allege the purposeful concealment required to invoke the exception." R&R at 54. *See Caputo v. Pfizer*, 267 F.3d 181, 191 (2d Cir. 2001) (explaining that to get the advantage of the fraud and concealment exception, "the plaintiffs must plead fraud with the requisite particularity"). Nor could he. This case does not present a "self-concealing scheme of deception." Obj. at 18. It involves a readily available Plan Document, an SPD disseminated to Players, and the Board's discretionary interpretation of the reclassification provision, which the Board disclosed to participants seeking reclassification and openly litigated in federal court.

Hudson reargues that the statute of limitations should be extended because "the Complaint pleads Defendants' breaches as an ongoing scheme." Obj. at 20; Pl.'s Opp. at 32. Not so. The Complaint alleges that the breach occurred in advance of his initial application and that he was "locked in" to a lower category of benefits at the time of his original benefits award. At that point Hudson was subject to the reclassification standard, and the Board could no longer "avert[] [Hudson]'s detrimental reliance on the incomplete information." *Moyle v. Liberty Mut. Ret. Benefit Plan*, No. 10-cv-2179, 2016 WL 7242021, at *13 (S.D. Cal. Dec. 15, 2016) (citation omitted). Hudson's Complaint was brought seven years and one day later, and is therefore barred by ERISA's six-year statute of repose.

III. The Court Should Overrule Hudson's Objections Concerning Count V.

Count V focuses on the longstanding limitations provision found at Plan Section 11.7(b) and reproduced in the SPD. It alleges Section 11.7(b) is void as against public policy "[t]o the extent that" it conflicts with section 413 of ERISA because it impermissibly "attempts to relieve these Defendants of their responsibility or liability to discharge their fiduciary duties under

ERISA" in violation of ERISA. Compl. ¶ 110. Assuming that Plan Section 11.7(b) violates ERISA and goes against public policy, Hudson then claims it was a breach of fiduciary duty for any of the Plan's fiduciaries to adopt Plan Section 11.7(b) and disseminate an SPD discussing it. Compl. ¶ 111. Finally, Hudson alleges the SPD violates section 102 of ERISA because it does not contain adequate explanations or illustrations of circumstances that might toll the statute of limitations. Compl. ¶ 107.[8]

A. Hudson lacks standing to bring Count V.

Count V appears to be motivated by Hudson's view that Section 11.7(b) deviates from section 413 of ERISA and, if it does, it might bar some or all of his claims in this case. Although Judge Lehrburger did not reach this issue,[9] Hudson has no standing to bring Count V because Section 11.7(b) does not deviate from section 413 of ERISA. Section 11.7(b) mostly quotes section 413 of ERISA and states that it controls "except as provided in ERISA section 413." Compl. ¶ 104; Obj. at 24. Therefore, to the extent that there is any material difference between the Plan's limitations provision and the requirements of ERISA, the Plan explicitly recognizes that it must cede to ERISA.

Even if the "except as provided in ERISA" clause did not exist, Hudson still lacks standing to bring Count V because the Board has never attempted to enforce any differences between the statute and the Plan's limitations provision against Hudson. To the contrary, the Board Defendants have argued in this litigation that Hudson's claims are untimely under New York law (applicable to an ERISA section 102 claim) and section 413 of ERISA (applicable to a

[8] In his Objections, Hudson cites paragraph 107 of the Complaint and states that the SPD "fails to explain that the Plan attempts to modify ERISA's statute of limitations or explain how this impacts participants' rights." Obj. at 24-25. Paragraph 107 contains no such allegation.

[9] *See* R&R at 59, n.22 (declining to address whether Hudson has constitutional standing after finding that Count V was time-barred).

breach-of-fiduciary-duty claim). Absent some articulable harm, Hudson does not have standing to complain about Section 11.7(b) or the alleged deficiencies in the SPD. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Judge Lehrburger found Hudson lacked standing to bring Count IV because Hudson "fail[ed] to allege any injury in fact." R&R at 55 ("There is no alleged connection between Counts IV and V and any actual harm that Hudson alleges to have suffered, namely that he should be entitled to a higher level of T&P benefits."). Hudson does not challenge that conclusion, and he abandoned Count IV as a result. Obj. at 1, n.1. The same rationale justifies dismissal of Count V.

B. Judge Lehrburger correctly determined Count V is untimely.

Hudson omits that the language he finds objectionable has been in the Plan Document and the SPD since at least 2009 and 2010, respectively. Compl. ¶¶ 104-06; Plan Doc. § 11.7(b); SPD at 38. The fact that this language was included in the Plan Document and disseminated to Hudson nearly a decade before he chose to file suit drove Judge Lehrburger's recommendation that Count V should be dismissed, and it should similarly be dispositive for the Court. *See* R&R at 58 ("Hudson's Count V is plainly time-barred. Hudson acknowledges that the above language was included in both the Plan and Summary Plan Description since at least 2009 and 2010, respectively."). Count V is untimely regardless of whether it is based on an alleged breach of fiduciary duty under section 404 of ERISA or a violation of ERISA section 102's SPD requirements.

The limitations period on a breach-of-fiduciary-duty claim extends six years from the date of the breach, or three years from the plaintiff's knowledge of the breach, whichever is earlier. 29 U.S.C. § 1113. Hudson's breach-of-fiduciary-duty claim is untimely under the six-

year period. Moreover, because that six-year period is a statute of repose that runs from the date of the alleged breach, Count V is untimely regardless of Hudson's actual knowledge.[10] *See California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (noting that 29 U.S.C. § 1113 establishes a six-year statute of repose); *id*. at 2049 (explaining that "statutes of repose are enacted to give more explicit and certain protection to defendants," and "[f]or this reason, statues of repose begin to run on the date of the last culpable act or omission of the defendant") (citation and quotation marks omitted).

SPD-based claims under section 102 of ERISA must be brought within three years of when the plaintiff knew or should have known of the alleged violation. *Osberg v. Footlocker, Inc.*, 138 F. Supp. 3d 517, 559 (S.D.N.Y. 2015). Hudson acknowledges that SPDs containing the offending language were periodically distributed to Players.[11] Compl. ¶¶ 71, 74, 75. Therefore, by 2010 he had every material fact giving rise to his claim that the SPD did "not provide any explanation, examples, or illustration of what facts would result in an exception" to the statute of limitations. Compl. ¶ 107. *See Muehlgay v. Citigroup, Inc.*, 649 F. App'x 110, 111 (2d Cir. 2016) ("A plaintiff has 'actual knowledge' of a breach or violation 'when he has knowledge of all material facts necessary to understand that an ERISA fiduciary has breached his or her duty or otherwise violated the Act.'… A plaintiff, however, 'need not have knowledge of the relevant

[10] Hudson's statement that "nothing suggests that [he] had the actual Plan Documents more than 3 years prior to May 2018," Obj. at 25, is not just beside the point, it is disingenuous. Hudson applied for T&P benefits in 2010 with the aid of counsel, and he vigorously pursued Football Degenerative benefits with a clear understanding of the relevant Plan terms and distinctions. Likewise, when Hudson sought reclassification in 2014, he again did so with the assistance of counsel, and his request quoted the "changed circumstances" language within the Plan's reclassification provision. Compl. ¶ 35. Based on these indisputable facts, ***everything*** suggests that Hudson had the actual Plan Documents more than 3 years prior to filing suit.

[11] While Hudson now claims "nothing suggests that [he] had the actual Plan Documents more than 3 years prior to May 2018," Obj. at 25, he has never claimed that he did not have the SPDs that were periodically distributed to Players, as ERISA requires.

law[.]'") (citing *Caputo*, 267 F.3d at 193). Hudson had until 2013 at the latest to bring a claim under section 102 of ERISA.

CONCLUSION

For the foregoing reasons, the Court should adopt Judge Lehrburger's Report & Recommendation and dismiss Hudson's Complaint with prejudice.

Dated: September 26, 2019

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